

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

NIKERRAY MIDDLEBROOK,

 Petitioner,

 v.

THOMAS CARROLL,
 Warden, and **CARL C. DANBERG,**
 Attorney General of the State of
 Delaware,

 Respondents.

RESPONSE TO MOTION FOR LEAVE TO AMEND PETITION

Respondents submit the following in response to the petitioner's motion for leave to amend his habeas petition dated September 11, 2006:

1. The petitioner, Nikerray Middlebrook, has applied for federal habeas relief, challenging his 1997 conviction by a Delaware Superior Court jury of attempted first degree murder, first degree assault (as a lesser-included offense of attempted first degree murder), two counts of possession of a firearm during the commission of a felony ("PFDCF"), and possession of a deadly weapon by a person prohibited. D.I. 2; *Middlebrook v. State*, 815 A.2d 739, 741 (Del. 2003). The State filed an answer addressing the claims in the petition on March 8, 2006. D.I. 10. The petitioner filed a traverse dated April 5, 2006. D.I. 15. In a motion dated September 11, 2006, the petitioner now seeks leave of the Court to amend his habeas petition. D.I. 21. This is the respondents' response to Middlebrook's motion.

2. Middlebrook seeks to withdraw certain claims from his petition and to add additional claims in their place. Specifically, Middlebrook asks to delete the following grounds for relief presented in his original petition: ground one, a claim concerning the admission of a

photograph into evidence; ground two, concerning testimony that referred to a prior arrest of Middlebrook; ground three, regarding the court's decision not to permit live witnesses at testify in mitigation at sentencing; and ground four, a claim of ineffective assistance of trial and appellate counsel. D.I. 21 at 3-5. Respondents do not oppose amendment of the petition to delete these three particular claims.

3. Middlebrook seeks to add three "new" claims: (1) a request for DNA and ballistic testing; (2) ineffective assistance of appellate counsel for failure to raise a claim of "speedy trial and appeal" (D.I. 21 at 4); and (3) ineffective assistance of trial counsel for failure "to impeach eyewitnesses with evidence of witness tampering and prior dishonest conduct." D.I. 21 at 3-5. In the first instance, a request for DNA testing is not a federal claim cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a). As to Middlebrook's second new claim, he raised the same claim of ineffective assistance of appellate counsel in his original petition and respondents answered that claim. D.I. 2 at 11; D.I. 10 at 14; D.I. ___ at 15-16 (Amended Answer). Finally, Middlebrook's third claim was also presented in his original petition and the issue was addressed by respondents. D.I. 2 at 9; D.I. 10 at 8-9.

4. Because Middlebrook's proposed claims have either already been presented in his original petition or are not cognizable, there is no need for him to amend his petition. Further, respondents filed an answer to the original petition in March 2006 (D.I. 10), addressing all of Middlebrook's claims.

Respondents respectfully request that the court deny petitioner's motion for leave to amend his habeas petition.

/s/ Elizabeth R. McFarlan
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
Del. Bar. ID No. 3759
elizabeth.mcfarlan@state.de.us

Date: September 22, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2006, I electronically filed a response to motion for leave to amend petition with the Clerk of Court using CM/ECF. I also hereby certify that on September 22, 2006, I have mailed by United States Service, two copies of the same document to the following non-registered participant:

Nikkeray Middlebrook.
SBI No. 295569
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

/s/Elizabeth R. McFarlan
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
Del. Bar. ID No. 3759
elizabeth.mcfarlan@state.de.us